The puissance of infringement procedures in tackling rule of law backsliding

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Our intuition tells that the Court of Justice of the European Union (CJEU) in C-619/18 P *Commission v. Poland* will rule against Poland. Although much depends on how the Court will frame its decision, the experience teaches that the ruling alone will not solve the problem of rule of law backsliding in the Member State concerned. Rather, the infringement action concentrates on an isolated violation resulting from a legal act that in practice is part of a wider project of the government targeting the independence of the judiciary. Since it does not address the roots and the entirety of the problem, it cannot be expected to restore the rule of law. This narrow approach to rule of law backsliding – albeit safe in terms of legal grounds – does not address its spill-over effects on fundamental rights and freedoms. One should not lose sight of attacks on public watchdog organisations, such as the press or NGOs, academic freedom and mass surveillance, just to name a few real-life examples from EU Member States that accompany rule of law backsliding.

In this blog post we propose the CJEU to introduce “rule of law infringement procedures”, having both a fast-track and a freezing component, as part of a wider “EU rule of law toolbox”. Rule of law infringement procedures would not require revisions of EU treaties, but more effective use of the existing legal and procedural tools. Rule of law infringement procedures should be conducted by taking the following five suggestions and warnings into account.

First, the European Commission should identify the rule of law problem explicitly. Second, it should not waste time and postpone its legal actions, while a Member State openly violates the rule of law. Third, the CJEU should automatically prioritise and accelerate infringement cases with a rule of law element to avoid more harm being done by those in power. Fourth, interim measures should be used to put an immediate halt to rule of law violations that can culminate in grave and irreversible harm. Fifth, EU institutions should establish a periodic rule of law review to determine if there is a systemic threat to the rule of law in a given Member State that would provide additional legitimacy to the European Commission for initiating rule of law infringement actions and the CJEU ruling on such matters.

1.1 Calling a spade a spade

Our first proposition is that rule of law issues must be named as such. When targeting individual issues, it is more difficult to recognise the systemic attacks on the rule of law. Therefore, the Commission should follow Scheppele’s suggestion and bundle cases with similar root causes. Alternatively, the Member States should

use direct actions against other Member States violating the rule of law along Kochenov's biting intergovernmentalism theory.

In view of the recent proactive role of the European Parliament in tackling rule of law backsliding, the possibility of initiating legal proceedings in such cases might also be granted to the only democratically elected EU institution. But even in the absence of such an approach, the rule of law element, when present, should be expressly acknowledged and accordingly tackled. The misconstruction of the Hungarian judicial capture as a case of age discrimination serves as an illustration of the mistake of not calling rule of law backsliding by its name.

1.2 No room for a discursive approach

Whatever procedure is followed to enforce the rule of law, there is no reason to waste time by deliberation, debate, and discussion, once the problem areas have been established in a thorough, contextual, qualitative analysis, along with objective assessment, equal treatment of the countries and scientific rigour. The government in question should be given time to present its arguments, but prolonged procedures with extended deadlines after the previous ones have been ignored by a Member State concerned do not make much sense.

As the application of the rule of law framework vis-à-vis Poland proved, there is no reason to presume the good intentions of a power capturing state institutions to engage in a sunshine approach involving a dialogue and soft measures.

1.3 Expedited rule of law procedures

Even if rule of law problems are addressed as such and the European Commission takes legal action before a constitutional capture is completed, court proceedings are often protracted. This is a major drawback given the gravity of the harm that can be done to a legal system in a Member State, and by implication to the EU legal system. Therefore, if the case reaches the judicial phase, the CJEU should automatically take into account the gravity of the possible consequences of rule of law violations, the scale of its effects, and the fact that time is on the side of those violating the rule of law.

Once the constitution is rewritten, institutions that were supposed to serve as checks on those in power are weakened and individuals loyal to the government are appointed to key positions, it becomes extremely difficult to make a U-turn and restore the rule of law, and even more challenging to explain the necessity of this change to the people. There are also collateral issues. By the time the potentially negative assessment is published, the state scrutinised might have changed its laws or practices, and require another analysis and evaluation. The new laws adopted or practices introduced may be equally substandard, and continue to harm the legal system until yet another assessment becomes public.

Accordingly, we propose to automatically accelerate the proceedings with a rule of law element. Technically, such a process should be triggered if the Commission invokes Article 2 TEU or at the minimum when Article 2 TEU in conjunction with Article 19 TEU are jeopardized. This approach corresponds to the CJEU's decision in *Associação Sindical dos Juízes Portugueses*, where, as Laurent Pech and Sébastien Platon put it, "the Court essentially establishes a general obligation for Member States to guarantee *and* respect the independence of their national courts and tribunals".

The Statute of the CJEU (in Article 23(a)) and the CJEU's Rules of Procedure make acceleration of court procedures possible. The expedited procedure for preliminary rulings (Articles 105-6 Rules of Procedure), the expedited procedure for direct actions (Articles 133-136 Rules of Procedure) and the urgent preliminary ruling procedures in the area of freedom, security and justice (Articles 107-114 Rules of Procedure) deserve attention. In addition, priority treatment (Article 53(3) Rules of Procedure) may be granted to certain cases by the president of the Court if special circumstances apply.

1.4 Interim measures

Typically, even a fast-track infringement procedure will not be prompt enough to prevent the harm that rule of law violations may cause to a legal system. Therefore, interim measures should be ordered in infringement procedures involving a rule of law element.

An interim measure has been invoked in a recent infringement case, in the infamous Bia#owie#a forest affair for logging trees at the UNESCO-protected NATURA 2000 site. In *Bia#owie#a*, pending the judgment in the main proceedings, the CJEU ordered Poland to stop the logging. The Polish response was an intensified cutting of trees, and additionally, the government even asked for the forest in question to be removed from the UNESCO World Heritage List. In order to create more incentives for Poland to follow the interim measure, the CJEU decided that penalty payments would be imposed on Poland if the government failed to comply with the interim measure immediately and fully. As Koncewicz argued, the case "shows that the Treaties do contain legal tools to respond to the recalcitrant member states riding roughshod over the core values and principles of the EU legal order".

In order to prevent more harm being done to the rule of law, and in line with the precautionary principle, we argue for interim measures suspending the given national policies under the threat of dissuasive fines, putting a halt to rule of law violations until corresponding cases are decided on their merits. The precautionary principle is a policy-making strategy: whenever an activity might result in harm or injustice, measures should be taken to prevent this, even if the exact effect of the discussed steps on the possible harm are not fully established scientifically.

In Poland there are currently no domestic remedies that could be effectively used to counteract unconstitutional laws, policies or practices. That is because the ruling majority has captured a majority of judges on the Constitutional Tribunal, which, as

Sadurski put it, has turned into an ally of the government, while the constitutional accountability of current officeholders remains out of the question for political reasons (at least during this parliamentary term). Hence, all constitutionally dubious legal acts – such as the amended Act on the National Council of the Judiciary, the Act on the Supreme Court and the Act on the system of ordinary courts – enjoy the presumption of constitutionality and remain legally valid. While their legitimacy is at the lowest ebb, they are part of binding law. As a result, they are followed and abided by those who remain faithful to the rule of law (like some of the judges who silently accepted their removal or requested the president of Poland to extend their service). The remedy may thus only come from EU institutions.

As Koen Lenaerts, President of the CJEU noted: a failure to comply with the Court's decision would be a step towards secession from the EU. This would indeed serve as evidence that the foundational values enshrined in Article 2 TEU are no longer shared by Poland, but such a disregard is fatal also procedurally, as the EU thus far has not tested any other tools (and Article 7 TEU is too burdensome) to prevent the dismantling of the EU from within.

1.5 An EU mechanism to enforce the rule of law

When assessing whether a Member State is engaged in rule of law backsliding, the judiciary is overburdened, whereas political institutions – because of the high political threshold an Article 7 TEU procedure requires – escape responsibility in enforcing common values altogether. Therefore, an EU mechanism on democracy, the rule of law and fundamental rights (DRF monitoring and enforcement mechanism) – as proposed by the European Parliament and earlier by one of us – should be brought to life. A regular, possibly annual supervisory mechanism, based on a contextual analysis of national laws and policies, a scientifically proven methodology, objective standards and equal treatment of Member States, should be established.

With such a mechanism in place, the EU could warn the respective Member State in due time and request a return to these values. Also, if a Member State has already breached these values, EU institutions would not have to wait for external actors (like the European Court of Human Rights or the Venice Commission) to indicate generic problems with the rule of law but could use their own scoreboard system.

In mutual recognition cases, scholars like Carrera and Mitsilegas pushed for a freezing mechanism and indeed in C-404/15 *Aranyosi and C#ld#raru* and C-216/18 PPU *Minister for Justice and Equality* v *LM* (also known as the Celmer affaire, exhaustedly debated on Verfassungsblog) the CJEU allowed and even obliged national executing courts to suspend surrender, until the potential human rights violations in the issuing state are confirmed or rebutted. So as not to overburden the judiciary, Bárd and van Ballegooij went one step further and argued that surrender cases should be frozen by the national courts, "awaiting a resolution of the matter from political actors in accordance with the procedure provided for in Article 7 TEU or the DRF monitoring and enforcement mechanism called for by the European Parliament".

The rule of law mechanism could indicate when to start rule of law infringement procedures or whether it is necessary to request interim measures. Furthermore, it would allow the EU to act promptly and suspend the application of EU laws based on mutual recognition, and thus relieve courts of this burden. It could also indicate when mutual trust can be re-established instead of leaving to the judiciary case-by-case decisions on this matter.
